Supreme Court, U.S.
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No. 91-689

In The

Supreme Court of the United States

October Term, 1991

CITIBANK, N.A.,

Petitioner,

vs.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Pursuant to Rule 15.7, respondent briefly addresses certain of the positions taken by the United States in its brief dated June 1992. The United States urges this Court to go to the extreme length of creating federal common law, and displacing non-conflicting state law, in an area where Congress itself has expressly declined to legislate. In addition, as demonstrated below, the issue raised by the United States has been mooted. The case remains non-certworthy.

ON THIS RECORD THERE IS NO OCCASION TO CREATE FEDERAL COMMON LAW

The United States and Citibank seek the creation of federal common law where none exists even if that means trampling upon the contractual rights of the parties and the sovereign right of the State of New York to declare what law governs the relationship between the depositor, WFAL, and Citibank, a national bank headquartered in New York and subject to its jurisdiction. This Court has been reluctant in the past to serve as a vehicle for litigants desirous of changing laws when they have been unsuccessful before Congress and the proper administrative agencies. *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), where this Court reasoned:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business

> of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Id. at 647 (citation omitted).

Nowhere in the brief of the United States is it explained why it is necessary or appropriate for the judicial branch to create the proposed law, given our separation of powers. Nowhere is it explained why this Court should make new law when a bill to do exactly what is proposed here was considered and rejected as part of the Federal Deposit Insurance Corporation Improvement Act of 1991 enacted on November 26, 1992.[1] Nor is it explained why this Court should change the law *retroactively* when the bills proposed in Congress by the same regulatory agencies have suggested change *prospectively*. Nor is it explained why this Court should change the law *retroactively* at the behest of the federal regulatory agencies when they have known of this banking dispute since 1984 and have adopted no rules or regulations addressing the issue they now say is of paramount importance. Finally, nowhere does the United States say why this Court should grant certiorari *for a second time* when the case involves only "factual determinations" and the opinion of the Court of Appeals "decides no novel or undecided question of federal law" as previously

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[1] Senate bill S.543 § 1131 failed and similar legislation is being proposed this term.

observed by the Chief Justice. App. 25a and Transcript of Oral Argument, No. 88-1260 (March 1990) 4-5.

THE ISSUE RAISED BY THIS APPEAL HAS BECOME MOOT

The United States misstates the question presented. The United States and Petitioner continue to rely upon the premise, rejected by both courts below, that the Philippine government *prevented* the Manila branch from repaying WFAL's deposits.

The issue which Citibank and the United States raise has been mooted by Citibank's successful application to the Philippine Central Bank to repatriate profits of over $160 million from its Manila branch. Until the fall of 1990, everyone, including this Court, accepted Citibank's representation that the assets of the Manila branch were "blocked" by the Philippine decree. But the situation changed dramatically when it was discovered that Citibank had been withdrawing U.S. dollars from that country as earnings. The discovery of this debacle was made following this Court's opinion at 495 U.S. 660 (1990). It should put this matter to rest. Citibank has lost because it failed to establish its impossibility defense, not because the lower courts have created some new "home office" rule.[2]

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[2] Since the applicable decree permits repayment with "prior approval," permission to repay must be sought in order to sustain a defense of impossibility. This is hornbook law. *E.g.*, 18 Williston, Contracts (3d ed. 1978), text before and n. 3, 4 at 273.

The United States dismisses these important developments with the back of its hand, failing to meet the real issue – that Citibank failed to seek permission to repay with branch assets.[3] See U.S. Br. at 14 n. 12. Rather, Citibank breached its obligation of good faith and fair dealing when it refused to seek permission to repay its creditors and yet later obtained permission to remit earnings to itself. Thus, it is Citibank's *failure to ask*, not the Central Bank's decree that has defeated Citibank's defense of impossibility.

The issue of law that Citibank and the United States are determined to have this Court resolve is not presented. On this record, there is no occasion for this Court to address the issue of whether the *home office* of a United States bank is liable for repayment of deposits when branch assets are "blocked" by a foreign government, for Citibank never fulfilled its obligation to test whether these assets were in fact blocked. Since this Court does not sit to render advisory opinions, the petition should be denied.

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[3] The United States incorrectly characterizes WFAL's position as one of dissatisfaction with the Philippine government's restrictions. But, the Philippine government has adopted two decrees, one requiring Philippine branches to obtain permission before repaying certain deposits (MAAB No. 47) and the other requiring them to obtain permission before remitting earnings to their home offices (Section 49 of Central Bank Circular No. 1028). WFAL is not expressing dissatisfaction with the foregoing or with the administration of the decrees by the Philippine Central Bank. Indeed, the latter has granted permission to repay branch deposits when to do so would not adversely affect the country's objective of conserving scarce foreign exchange. J.A. 91-92; J.A. 95-97.

THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL LAW

The United States has incorrectly characterized the Court's holding. The United States claims that the Court of Appeals held that Citibank must repay WFAL with New York assets *because* it did not seek consent to use those assets. U.S. Br. at 13-14. As noted in WFAL's Brief in Opposition, the decision by the Court of Appeals is both sound and fully supported by precedent. The Second Circuit concluded that New York law required Citibank to use its home office assets *because,*

> [T]he district court noted that the most recent pronouncement of the New York Court of Appeals, *see Perez v. Chase Manhattan National Bank, N.A.* . . . indicated that the parent bank is ultimately liable for the obligations of the foreign branch. Pet. App. 8a.

The Court of Appeals specifically left undecided whether a New York court would hold a bank liable if it sought and was denied permission to use home office assets to repay because Citibank "had not satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Citibank's non-Philippine offices." Pet. App. 9a.

In urging this Court to displace state law with federal common law regulating deposit contracts, the United States misapplies the portions of the federal banking regulatory scheme it cites. There is an important difference between: (i) a regulation which prescribes where deposits are to be repaid in the absence of an agreement between the parties; and (ii) one which does not prescribe

where deposits are payable, but instead specifies consequences, such as reserve and deposit insurance requirements, if the parties have selected a particular place of payment.

The United States and Citibank repeatedly confuse these two concepts. They invoke statutes and regulations, such as 12 U.S.C. 461(b)(6); 12 U.S.C. 1813(*l*)(5)(A); 12 C.F.R. 204.1(c)(5); and 12 C.F.R. 204.128, for the proposition that "[t]he agencies have adopted and long employed a rule that, unless the parties agree otherwise, a foreign branch deposit is payable only abroad." U.S Br. at 18. The regulations and statutes cited do not support this proposition. They are silent about where deposits are payable absent an agreement; rather, they govern the reserve and insurance consequences of deposits on the basis of the parties' *agreement*. The statutes and regulations leave it open to the parties to allocate sovereign risk.

Moreover, the United States asserts that this supposed regulatory scheme "establishes a federal policy . . . consistent with widely accepted general banking law principles" allocating sovereign risk to the depositor absent a contrary agreement.[4] U.S. Br. at 19. This

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[4] Neither the United States nor Citibank cite a single case that has excused a bank's refusal to repay a deposit under the circumstances presented here, i.e., when a government decree encumbered a branch's assets, but does not encumber the branch's deposits. Rather, the United States cites a technologically obsolete case dealing with attachments. *United States v. First National City Bank*, 321 F.2d 14 (2d Cir. 1963), *aff'd en banc*,

(Continued on following page)

assertion flatly contradicts the government's observation that there is "wide variance of opinion in the international banking community" regarding "the issue of the allocation of sovereign risk." U.S. Br. at 11, n. 10 and text. The United States also ignores the trial court's uncontested finding of fact that there is no custom and practice to this effect. Pet. 53a, 59a.

Finally, contrary to the position asserted by the United States at 19 n. 18, the Court of Appeals correctly held that there is no conflict between state law and the federal statutes and regulations governing offshore deposits. Pet. 9a-10a. The Court cited and relied upon 12 C.F.R. 204.2(t), which defines a deposit that is "payable only outside the United States" as "a deposit . . . as to which the depositor is entitled, *under the agreement with the institution*, to demand payment *only* outside the United States." (Emphasis the court's). From this the Court of Appeals concluded:

> The provisions relied upon thus do not reveal a policy of allocating the risk to depositors as a matter of law where there is no such agreement. So long as state law does not restrict a bank's freedom to enter into an agreement that allocates the risk of foreign sovereign restrictions,

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325 F.2d 1020 (1964), *rev'd*, 379 U.S. 378 (1965). In contrast, the New York courts have specifically held the bank to be liable under these circumstances. *Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 145 N.E. 917 (1924). *See also, Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), *cert denied*, ___ U.S. ___, 110 S.Ct. 2602 (1991).

> state law does not conflict with the federal policy reflected in current statutes or regulations. We see no such restriction in the law of New York and hence there is no " 'significant conflict' ". . . . Pet. 10a.

The United States attacks this holding by arguing that " . . . the court misread that regulation, which simply clarifies that foreign branch deposits by United States residents in amounts less than $100,000 are not entitled to the reserve exemption."[5] U.S Br., n. 18 at 18-19. This is not correct. The United States simply has it backwards. While the language it focuses upon does not apply to small deposits by U.S. residents, it does apply to all other deposits by residents and non-residents alike. Consequently, as the Court held, there is no conflict, much less a "significant" one, between federal law or policy and state law. *See* WFAL Opp. at 19-20.

MUNSINGWEAR DOES NOT APPLY

Contrary to the suggestion of the United States, U.S. Br. at 20 n. 22, this case may not be appropriate for *vacatur* under the rule enunciated in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), if Citibank belatedly repays the principal amount of the deposits. As that case demonstrates, application of the *Munsingwear* doctrine turns upon the circumstances under which a case terminates. Respondent suggests that no decision concerning that question be made until all of the facts are known.

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[5] The regulation is set forth in WFAL's Opposition at 18 and at App. 87a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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